Supreme Court, U.S.
FILED
OCT 24 1984
ALEXANDER L. STEVAS
CLERK

No. 84- 521

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

EDWIN P. KRIEGESMANN
Petitioner

vs.

BARRY-WEHMILLER COMPANY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the Eight Circuit err by affirming summary judgment against Petitioner where the record, void of any issue of material fact, established that the Petitioner, despite active knowledge of his ADEA rights on the date Respondent informed Petitioner of his dismissal and relieved him of his duties, filed his notice of intent to sue after the expiration of the 180 day statutory filing period?

PARTIES TO THE ACTION

Petitioner, Edwin P. Kriegesmann, is an individual residing in the State of Missouri. Respondent, Barry-Wehmiller Company, is a Missouri corporation. It has no parent company, partly owned subsidiaries or affiliates.

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10 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §2716 at 650-54 (1983) 14

Relevant Statutory Provisions

29 U.S.C. §626 (d)(1) (1982):

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty (60) days notice of an intent to file such action. Such notice shall be filed --
>
> (1) Within one hundred eighty (180) days after the alleged unlawful practice occurred.

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OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court have not yet been reported. Petitioner has included copies of them as Appendix A and B to his petition.

STATEMENT OF THE CASE

This case involves a summary judgment entered against Petitioner. Edwin P. Kriegesmann ("Petitioner" or "Kriegesmann"), on his age discrimination claim brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634 (1982). On January 12, 1984, the District Court granted the motion for summary judgment of Respondent Barry-Wehmiller Company ("Respondent" or "Company") on the grounds that Kriegesmann had failed to file notice of intent to sue within one hundred eighty (180) days of the allegedly discriminatory act, as required under the ADEA. In a per curium opinion, the Court of Appeals for the Eighth Circuit affirmed the District Court's judgment.

Petitioner began his employment for the Company in April, 1961. (Tr. 15-16.)[1/] During his employment, he performed a variety of jobs. (Tr. 16-41.) Between 1980 and 1982, a reduction in the Company's work force occurred. (Tr. 54-55.) On January 22, 1982, Kriegesmann's supervisor informed Kriegesmann of his dismissal because of the Company's elimination of Petitioner's job. (Tr. 53.) When so informed, Kriegesmann threatened to sue the Company. In his deposition, Petitioner admitted that at the time of his discharge, he knew of his rights

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1/ As used in this Brief, "Tr." followed by a number means Petitioner's deposition at the page of the number referenced. This brief includes the relevant portions of Kriegesmann's deposition transcript referenced in this brief as an attachment entitled Appendix One.

under ADEA, and that he intended to sue the Company under its provisions. (Tr. 53-54.) Kriegesmann further admitted that he had seen the "EEOC poster relating to age discrimination" posted at the Company. (Tr. 111-112.)

Approximately one week after his discharge, Petitioner met with Company's personnel director concerning his severance pay. The personnel director told Kriegesmann that the Company would pay him severance pay equal to twenty-seven (27) weeks of compensation. This represented one (1) week's severance pay for each of Petitioner's twenty-one (21) years of employment with the Company, four (4) weeks accrued vacation pay and two (2) weeks for the current pay period. The personnel director offered Kriegesmann the option of taking his

severance pay either in a single lump sum or in monthly installments over the next six (6) months. He recommended that Petitioner elect to receive his severance pay in monthly installments. The personnel director explained that he based his recommendation on the Company's policy of continuing its health and insurance benefits for as long as a former employee receives severance payments. The personnel director further informed Kriegesmann that, if Petitioner took his severance pay as a lump sum, his health and insurance benefits would end when he received the lump sum. Petitioner chose to accept his severance pay in monthly installments. (Tr. 55-57.)

The Company's personnel director met with Petitioner on one occasion later in January, 1982 for the purpose of offering

to assist Kriegesmann find a job. (Tr. 65.) He turned up one lead that did not result in a job for Petitioner. (Tr. 66.) In August, 1982, Kriegesmann found employment on his own with another St. Louis company. (Tr. 128-129 and 114.)

Petitioner's severance benefits ran out in late July, 1982. On October 21, 1982, two hundred and seventy-two (272) days after his termination, Kriegesmann filed notice of his intent to sue with the Equal Employment Opportunity Commission ("EEOC"). On July 11, 1983, Petitioner filed suit against the Company. The Company moved for summary judgment on November 16, 1983 on the grounds that Kriegesmann had not filed notice of intent to sue within the statutory time limit of one hundred eighty (180) days. On January 12, 1984,

the District Court granted the Company's motion and entered summary judgment in its favor. On July 19, 1984, the Eighth Circuit affirmed. Petitioner filed his Petition for a writ of certiorari to this Court on September 17, 1984. Respondent respectfully submits its brief in opposition to this Petition.

ARGUMENT

I. SINCE THE COMPANY ENGAGED IN NO MISLEADING, FRAUDULENT, OR DECEPTIVE CONDUCT DESIGNED TO LULL KRIEGESMANN INTO ABANDONING HIS ADEA RIGHTS, THE EIGHTH CIRCUIT RULED CONSISTENTLY WITH THE DECISIONS OF OTHER CIRCUITS BY AFFIRMING SUMMARY JUDGMENT AGAINST KRIEGESMANN, BECAUSE HE HAD FILED HIS NOTICE OF INTENT TO SUE MORE THAN 180 DAYS AFTER HE HAD FIRST KNOWN OF THE ALLEGEDLY DISCRIMINATORY ACT.

Neither the decision of the District Court, nor that of the Eighth Circuit in this case conflicts with any other

Circuit Court decision concerning equitable tolling of the statutory time limit for filing a complaint under the ADEA. At no time, furthermore, did either of these courts depart from the usual course of judicial proceedings. Hence, no writ of certiorari should issue.

Courts have recognized that the ADEA's mandatory one hundred eighty (180) day period for filing notice of intent to sue resembles a statute of limitations and so is subject to equitable tolling. Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982); Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 717-18 (8th Cir. 1982); Nielsen v. Western Elec. Co., Inc., 603 F.2d 741, 743-44 (8th Cir. 1979). The judicial decisions which have addressed the issue of equitable tolling

have established that only where the employer has engaged in "misleading, fraudulent or deceptive conduct," Smith v. American President Lines, Ltd., 571 F.2d 102, 111 (2d Cir. 1978), or has failed to provide adequate notice of ADEA rights do the circumstances justify tolling. Posey v. Skyline Corp., 702 F.2d 102, 105-06 (7th Cir. 1983). See Nielsen v. Western Elec. Co., Inc., 603 F.2d at 743. The uncontroverted evidence before the trial court established, by Petitioner's own admissions, a complete lack of justification for equitable tolling.

At no time did Respondent engage in conduct designed to mislead or "lull" Petitioner into not pursuing his ADEA rights. Petitioner's deposition testimony demonstrates that he himself decided

to take his severance pay in monthly payments as opposed to one lump sum payment. The Company's efforts to ease the trauma of termination, by offering assistance in finding a new job and by recommending a severance payment schedule which allowed the Petitioner to continue health and insurance coverage, cannot be construed as fraudulent or misleading conduct. "[A]s a matter of law . . . the attempt to mitigate the harshness of a decision terminating an employee, without more, cannot give rise to an equitable estoppel." Price v. Litton Business Systems, 694 F.2d at 965. In addition, the legal precedents on the issue have uniformly determined that payment of severance benefits do not extend the time period for filing notice of intent to sue. See Lawson v. Burlington

Industries, Inc., 683 F.2d 862, 864 (4th Cir.), cert. denied, 459 U.S. 944 (1982).

II. THE EIGHTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH THE NINTH CIRCUIT'S ARONSEN DECISION, BECAUSE THE TWO DECISIONS INVOLVED DISSIMILAR OPERATIVE FACTS.

Petitioner argues that the Eighth Circuit's decision in this case conflicts with the Ninth Circuit's decision in Aronsen v. Crown-Zellerbach, 662 F.2d 584 (9th Cir. 1981), cert. denied, 459 U.S. 1200. Aronsen, however, like the case at bar, is consistent with existing authority. Both cases provide that summary judgment may properly dispose of an equitable tolling issue. In fact, the Ninth Circuit specifically stated as follows: "On review of a grant of summary judgment, it must appear that the facts as alleged could not reasonably be construed

as permitting equitable estoppel or tolling." Aronsen v. Crown-Zellerbach, id. at 595. The two cases have divergent results not because the law as interpreted or applied differs, but because the factual foundations of the two cases have distinct differences.

The Company terminated Kriegesmann's employment on January 27, 1982. His supervisor told him to clean out his desk and vacate his office that day. (Tr. 51.) He received only the severance pay to which he was entitled under established company policy. (Tr. 56.)

In Aronsen, on the other hand, the employer informed the plaintiff of his termination one year before being required to vacate his office. During the one year "transition period", in addition to remaining on the payroll at his normal

salary, the plaintiff retained all "the perquisites of his position: office, secretary, travel and expense account." Aronsen v. Crown-Zellerbach, 662 F.2d at 586. In addition, he performed at least one job for Crown-Zellerbach during the year, and accepted other work that year only after receiving permission to do so from a company vice-president. Id. Thus, the plaintiff clearly had a continuing relationship with his employer after he had received notice of his termination. Consequently, he had a reasonable reluctance to file an ADEA claim, for fear of jeopardizing that relationship. Kriegesmann, however, lacked any continuing relationship with his employer after his dismissal. Therefore, Petitioner's reliance on Aronsen is misplaced.

III. ALTHOUGH KRIEGESMANN HAS WAIVED THE ISSUE OF ADEQUATE NOTICE BY NOT RAISING IT BEFORE THE DISTRICT COURT, THE RECORD CLEARLY ESTABLISHED BOTH THE COMPANY'S POSTING OF THE EEOC'S NOTICE CONCERNING ADEA RIGHTS AND PETITIONER'S ACTUAL KNOWLEDGE OF HIS RIGHTS ON THE DATE THAT HE FIRST LEARNED OF HIS TERMINATION.

Peitioner did not raise the issue of adequate notice before the trial court. An appellate court, in reviewing a summary judgment, "can consider only those papers that were before the trial court. The parties cannot . . . advance new theories or raise new issues in order to secure a reversal of the lower court determination." 10 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure at 650-54 (1983); see also Penton v. Crown-Zellerbach Corp., 699 F.2d 737, 741 (5th Cir. 1983); Tarpely v. Greene, 684 F.2d 17 n.17 (D.C. Cir. 1982). Hence, the Eighth Circuit followed established

judicial procedure when it refused to hear the issue of adequate notice on appeal.

Even if Petitioner could properly raise this issue, the trial court correctly granted summary judgment. Generally, an employer's failure to post an EEOC notice of ADEA rights will toll the 180 day filing period. Kephart v. Institute of Gas Technology, 581 F.2d 1287 (7th Cir. 1978). The filing period, however, begins to run whether or not notice is posted, if the employee acquires actual knowledge of his rights under the ADEA. Id. at 1289; Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195, 1198 (5th Cir. 1975). The District Court had uncontroverted evidence before it that established not only that Petitioner had seen "the EEOC

poster relating to age discrimination" at work, (Tr. 111-12), but also that at the time of his termina- tion Kriegesmann knew of his ADEA rights and intended to sue under its provi- sions. Kriegesmann described the extent of his knowledge of his ADEA rights on the date that he learned of his termina- tion as follows:

> Q. For the record, would you please state for me one more time what specifically was said at that January 22nd, 1982 meeting?
>
> A. I was told to follow them into the office. I went with them, and Mr. Swailes says, "We have made a hard decision. We're going to eliminate your job," and I replied back, "Why wasn't I offered any of the other jobs." Neither one answered me, and I said, "I'll evidently sue the company."
>
> Q. Did you tell them what you were going to sue the company for?
>
> A. No, sir, just made that statement.

Q. On what basis did you plan to sue the company when you made that comment on January 22, 1982?

A. Because I knew they would have to put somebody else in my job, otherwise they couldn't produce stuff. It wasn't a total elimination of my job. That's why I told them I would sue them under the EEOC. I just told them I would sue them.

Q. You said under the EEOC, meaning?

A. That's where I was going to go, under the Age Discrimination Act.

(Tr. 53-54). Thus, Plaintiff understood that his employment had terminated on January 22, 1982. He, moreover, believed that his termination violated the ADEA. Lastly, he knew that he needed to go to the EEOC to start his lawsuit. By his own testimony, Plaintiff established his actual knowledge of all the critical factors necessary for him to pursue his claim under the ADEA on January 22, 1982.

Finally, existing precedent consistently holds that the one hundred eighty (180) day statutory filing period begins to run when the employee first learns of the allegedly unlawful act, not when he feels its harmful effects. Price v. Litton Business Systems, Inc., 694 F.2d at 965; Lawson v. Burlington Industries, Inc., 683 F.2d at 863-64; Naton v. Bank of California, 649 F.2d 691, 695 (9th Cir. 1981); Bonheim v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1978); see also Delaware State College v. Ricks, 449 U.S. 250, 258 (1980) (Title VII case). Basically, Kriegesmann urges that the mere receipt of benefits from an employer after the employee has actual knowledge of the allegedly discriminatory act should extend the beginning of the

filing period for as long as the employee receives the benefits. By accepting Petitioner's position, this Court would create an exception which would devour the rule. The application of equitable tolling to Kriegesmann's claim would defy Congress' legislative determination that plaintiffs must provide notice of their intent to sue under the ADEA "[w]ithin one hundred eighty (180) days after the alleged unlawful practice occurred." See 29 U.S.C. §626(d)(1). For this reason, affirmative misconduct or deceit on the part of the employer must serve as a pre-condition to the application of the equitable tolling doctrine. An employee wrongfully mislead about his ADEA rights or his future employment by his employer

deserves the benefit of equitable tolling. An employee, however, who has knowingly slept on his ADEA rights in the absence of employer misconduct, such as Kriegesmann, merits no tolling of the limitation period. If any wrong has occurred, Petitioner caused it by his own neglect.

CONCLUSION

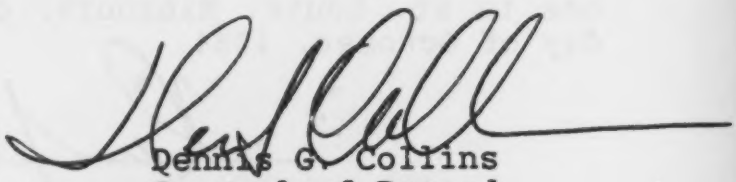
In brief, Kriegesmann asks this Court to reverse the Eighth Circuit not on the basis of any conflict among the circuit courts of appeal, procedural irregularity, or important question of federal law but because of factual circumstances beneficial to him. As previously discussed, no existing legal precedent furnishes any support for Petitioner's position. Kriegesmann personally chose

to receive his severance pay in periodic installments rather than as a lump sum. In so doing, he extended his health and insurance benefits for an additional six (6) months. Similarly, the Company's efforts to help Kriegesmann find new employment created no continuing relationship between Petitioner and the Company. Circuit courts of appeal which have considered issues similar to the one presented by Kriegesmann's Petition have unanimously refused to toll the filing period under the ADEA. Thus, Kriegesmann's petition lacks any basis for this Court to grant a writ of certiorari.

In addition, the Eighth Circuit correctly denied Kriegesmann's request that it reverse the District Court, because he lacked adequate notice of his

claim at the time of his termination. Since Petitioner never raised this issue to the trial court, he cannot pursue it on appeal. The record before the District Court, moreover, completely resolved this issue against Kriegesmann by his own admissions. Petitioner had actual knowledge of his ADEA claim against the Company on the day that he learned of his termination. He had previously seen a sign posted on a Company bulletin board which explained his rights under the ADEA. In addition, when his supervisor informed Kriegesmann of his termination, he replied, "I'll evidently sue the [C]ompany," (Tr. 53), meaning that he intended to exercise his rights under the ADEA. Therefore, Kriegesmann had actual knowledge of his ADEA rights and his alleged ADEA claim

against the Company on the date that he learned of his termina- tion. As such, Petitioner's petition to this Court provides no basis upon which to grant a writ of certiorari as to the issue of adequate notice. Accordingly, the Company respectfully requests that no writ of certiorari issue for the United States Court of Appeals for the Eighth Circuit.



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Dated: October 19, 1984

STATE OF MISSOURI)
) ss.
CITY OF ST. LOUIS)

CERTIFICATE OF FILING BY MAIL

The undersigned counsel of record and a member of the Bar of the Supreme Court of the United States, certifies that the original and forty copies of the foregoing instrument was filed in the Supreme Court of the United States by depositing same in an envelope addressed to the clerk of such court with first class postage fully prepaid and by depositing said envelope in a U. S. Post Office mail box in St. Louis, Missouri, on the 22nd day of October, 1984.

Subscribed and sworn to personally before me this 22nd day of October, 1984.

DEBRA J. SPAETHE
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 11/27/87
ST. LOUIS COUNTY

Notary Public

CERTIFICATE OF SERVICE

The undersigned certifies that three copies of the foregoing instrument was served upon Francis L. Ruppert, Ruppert and Benjamin, Attorney for Petitioner and Counsel of Record, 8000 Bonhomme, Suite

201, Clayton, Missouri 63105, with postage fully prepaid and by depositing said envelope in a U. S. Post Office mail box in St. Louis, Missouri, on the 22nd day of October, 1984.